ACE JERNEH INSURANCE BHD v. BEST RE (L) LTD

HIGH COURT MALAYA, KUALA LUMPUR
WONG KIAN KHEONG JC
[CIVIL APPEAL NO: 12ANCC-117-08-2014]
8 JANUARY 2015

ARBITRATION: *Arbitration clause – Construction of – Whether arbitration clause in insurance policy had been incorporated into reinsurance contract – Whether there was 'arbitration agreement' – General reference in contract to document containing separate arbitration clause – Whether fulfilled s. 9(5) of Arbitration Act 2005 to incorporate separate arbitration clause into contract – Whether format clearly evinced manifest intention to incorporate arbitration clause into reinsurance contract – Arbitration Act 2005, ss. 2(1), 10(1)*

INSURANCE: *Reinsurance – Construction of reinsurance contract – Whether arbitration clause in insurance policy had been incorporated into reinsurance contract – Whether there was express or implied term in reinsurance contract to show parties' intention to incorporate arbitration clause – Whether there was manifest omission of arbitration clause – Whether extension clause in contract supported incorporation of arbitration clause – Arbitration Act 2005, s. 9(5)*

INSURANCE: *Reinsurance – Construction of reinsurance contract – Whether arbitration clause in insurance policy had been incorporated into reinsurance contract – Approach by English Courts – Section 6(b) of the English Arbitration Act 1996 – Whether interpretation relevant to statutory construction of s. 9(5) of Arbitration Act 2005*

WORDS AND PHRASES: *'arbitration agreement' – Meaning of – Section 2(1) of Arbitration Act 2005 – Whether an arbitration agreement as defined in s. 9*

The appellant was an insurance company which had issued consecutive insurance policies for the insurance periods of 2009 to 2011 to Sony (M) Sdn Bhd ('Sony'). The insurance policies contained an arbitration clause. Subsequently, the appellant and the respondent entered into three 'Facultative Reinsurance Slips' ('three reinsurance contracts') containing similar terms for three consecutive periods. The appellant had paid Sony in respect of Sony's claims under the insurance policies for the insurance periods in 2009, 2010 and 2011 and sent 'settlement loss advises' and/or statement regarding the settlement of Sony's claims. Alleging that the respondent had failed and/or refused and/or neglected to fulfil its obligation under the three reinsurance contracts to indemnify the appellant, the appellant filed a suit against the respondent for, *inter alia*, payment of sums allegedly due from the respondent to the appellant arising from the three reinsurance contracts. The respondent, on the other hand, applied to the Sessions Court to stay the appellant's suit under s. 10(1) of the Arbitration Act 2005 ('AA') on the ground that the three reinsurance contracts read with the insurance policies contained the arbitration clause. The Sessions Court allowed the respondent's application and ordered, *inter alia*, a stay of all

A further proceedings in the appellant's suit and for the respondent to commence arbitration proceedings within three months from the date of the Sessions Court's Order. Hence, the appeal wherein the appellant sought to reverse the Order of the Sessions Court. The sole issue that arose in the appeal was whether the arbitration clause in the insurance policies had been B incorporated into the three reinsurance contracts within the meaning of s. 9(5) of the AA.

Held (allowing appeal with costs):

(1) For s. 10(1) of the AA to apply, there must be an 'arbitration C agreement'. According to s. 2(1) of the AA, an 'arbitration agreement' means an arbitration agreement as defined in s. 9 AA. If there is an 'arbitration agreement', the Sessions Court is mandatorily required under s. 10(1) of the AA to stay the appellant's suit unless the 'arbitration agreement' is null and void or impossible of performance. A mere general reference in contract 'A' to a document containing the D Separate Arbitration Clause, does not fulfil s. 9(5) of the AA so as to incorporate the Separate Arbitration Clause into contract 'A'. The reference in contract 'A' should expressly incorporate the Separate Arbitration Clause as part of contract 'A'. This was a question of construction of contract 'A' – not the interpretation of the document E containing the Separate Arbitration Clause – to ascertain the true, manifest and/or presumed intention of the parties to contract 'A'. (paras 16 & 18)

(2) An objective reading of the three reinsurance contracts showed the manifest intention of both the appellant and respondent not to F incorporate the arbitration clause into the three reinsurance contracts. It was highly unlikely that an important matter such as arbitration had been overlooked by both the appellant and respondent who had the necessary resources, expertise and legal counsel to make an informed decision on whether to arbitrate possible future disputes or not. (paras G 19 & 20)

(3) Applying the maxim of *expressio unius est exclusion alterius*, when both the appellant and respondent had expressly omitted an arbitration clause in the format, this could only mean that both parties had manifestly intended not to arbitrate any dispute which may arise from the three H reinsurance contracts. In any event, there was nothing in the three reinsurance contracts, either expressly or by way of implication, to show that both the appellant and respondent had manifestly intended to incorporate the arbitration clause in the three reinsurance contracts within the meaning of s. 9(5) of the AA. (paras 21 & 22)

I **(4)** The court disagreed with the reliance placed by the Sessions Court Judge ('SCJ') on the Extension Clause to support the incorporation of the arbitration clause into the three reinsurance contracts. The Extension Clause did not concern arbitration and hence, could not be used to

incorporate the arbitration clause into the three reinsurance contracts. If the Extension Clause was construed so widely, it may cause an injustice, if not an absurdity. Further, the approach by the English courts does not favour the invocation of the Extension Clause so as to justify an incorporation of the arbitration clause into the three reinsurance contracts. (para 23)

(5) Section 6(b) of the English Arbitration Act 1996 ('1996 Act') is not identical to s. 9(5) of the Malaysian AA. However, both provisions contain the phrase 'the reference is such as to make that clause part of the agreement'. In view of the similarity, the English cases, on the interpretation of s. 6(b) of the 1996 Act are relevant to the statutory construction of s. 9(5) of the AA. In the interest of uniformity of law of reinsurance in Malaysia and England, the court was reluctant to adopt a construction of the three reinsurance contracts which was different from the approach by the English Courts. (para 25)

(6) Although the appeal concerned the statutory construction of s. 9(5) and interpretation of the three reinsurance contracts, the SCJ did not consider the scope and application of s. 9(5) of the AA. Such lack of direction amounted to an error of law. Further, the SCJ had erred by deciding that the terms and conditions of the three reinsurance contracts 'clearly shows that this court does not have jurisdiction over the present dispute'. The three reinsurance contracts did not have an exclusive foreign jurisdiction clause which would deprive the Malaysian courts of the jurisdiction to hear the appellant's suit. Hence, the Sessions Court still had the jurisdiction to hear the appellant's suit pursuant to s. 65(1)(b) of the Subordinate Courts Act 1948. Even if the respondent was able to establish the incorporation of the arbitration clause into the three reinsurance contracts, s. 10(1) of the AA does not oust the jurisdiction of the Sessions Court but only mandates the Sessions Court to stay the appellant's suit and refer the parties to arbitration. (paras 28 & 29)

Case(s) referred to:

Albilt Resources Sdn Bhd v. Casaria Construction Sdn Bhd [2010] 7 CLJ 785 CA ***(refd)***

American International Specialty Lines Insurance Co v. Abbott Laboratories (2004) Lloyd's Rep 815 ***(refd)***

Bauer (Malaysia) Sdn Bhd v. Daewoo Corporation [1999] 4 CLJ 665 CA ***(refd)***

Cigna Life Insurance Co of Europe SA-NV & Ors v. Intercaser SA De Seguros Y Reaseguros [2001] Lloyd's Rep 821 ***(refd)***

Excess Insurance Co Ltd & Anor v. Mander [1997] 2 Lloyd's Rep 119 ***(refd)***

Home Assurance Co of New York v. Victoria Montreal Fire Insurance Co [1907] AC 59 ***(refd)***

Jamaluddin Mohd Radzi & Ors v. Sivakumar Varatharaju Naidu; Suruhanjaya Pilihan Raya (Intervener) [2009] 4 CLJ 347 FC ***(refd)***

Pine Top Insurance Co Ltd v. Unione Italiana Anglo Saxon Reinsurance Co Ltd [1987] 1 Lloyd's Rep 476 ***(refd)***

A *TNB Fuel Services Sdn Bhd v. China National Coal Group Corp [2013] 1 LNS 288 CA* ***(refd)***
Trygg Hansa Insurance Co Ltd v. Equitas Ltd & Ors [1998] 2 Lloyd's Rep 439 ***(refd)***
United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd [1993] 2 CLJ 31 SC ***(refd)***

B **Legislation referred to:**
Arbitration Act 2005, ss. 2(1), 9(1), (2), (3), (4)(a), (b), (c) (5), 10(1)
Rules of Court 2012, O. 34 r. 1(1), O. 55 r. 5(1)
Subordinate Courts Act 1948, s. 65(1)(b)

Arbitration Act 1996 [UK], s. 6(b)

C *For the appellant - Tunku Farik Tunku Ismail (Tan Sixin with him); M/s Azim, Tunku Farik & Wong*
For the respondent - Loo Peh Fern (Angela Yap with her); M/s Skrine

[Appeal from Sessions Court, Kuala Lumpur; Civil Suit No: B52NCC-337-05-05-2014]

D *Reported by S Barathi*

JUDGMENT

Wong Kian Kheong JC:

E **Introduction**

[1] This appeal from Sessions Court (this appeal) concerns a novel question of whether an arbitration clause in an insurance policy has been incorporated into a reinsurance contract.

F **[2]** The appellant company (appellant) is an insurance company which has issued consecutive insurance policies for the insurance periods of 2009 to 2011 (Insurance Policies) to Sony (M) Sdn Bhd (Sony). The Insurance Policies provide for Sony's indemnification by the appellant in respect of specified products of Sony which require repair and/or replacement.

G **[3]** The Insurance Policies have an arbitration clause (arbitration clause) as follows:

> 13.1 All differences arising out of this Policy shall be referred to the decision of an arbitrator to be appointed in writing by both parties or if they cannot agree upon a single arbitrator, to the decision of two arbitrators of whom one shall be appointed in writing by each of the
H parties respectively and in case of disagreement/dispute between arbitrators, the difference shall be referred to the decision of an umpire who shall have been appointed in writing by the arbitrators before entering on the reference, and an award by arbitration shall be a condition precedent to any right to action against [Appellant] as regards any dispute
I regarding the amount of the [Appellant's] liability under this Policy.

[4] The appellant and the respondent company (respondent) entered into three "Facultative Reinsurance Slips" (three Reinsurance Contracts) for the following consecutive periods:

(a) from 1 November 2009 to 31 October 2014 (first Reinsurance Contract);

(b) from 1 November 2010 to 31 October 2016 (second Reinsurance Contract); and

(c) from 1 November 2011 to 31 October 2017 (third Reinsurance Contract).

[5] Except for the period of reinsurance, the three Reinsurance Contracts have similar terms as follows:

Class of Insurance	Extended Warranty Insurance Programme
Period Of Insurance	...
The cedant	[Appellant]
The insured	[Sony]
Insured's address	...
Principal Coverage	Indemnification to the Insured if any of the Specified Sony Product sold/financed by the Insured during the Period of Insurance shall require repair and/or replacement due to the mechanical or electrical breakdown of the Components or Parts and causing a sudden stoppage of its function during the Extended Warranty Period.
Interest Insured	On all new Electrical Items sold on or after [specified period] and declared to the [Appellant] during the Period of Insurance.
Limit of Liability	Means the maximum liability of the [Appellant], with respect to any one claim, shall not exceed the value of the replacement of the damaged part with a new part or with material of an equivalent or similar kind and quality, or the purchase price of the Specified Sony Product at the time of purchase, as the case may be.
Territorial Limit	Anywhere within Malaysia (including Sabah and Sarawak)
Extensions/clauses	**As per standard Extended Warranty Insurance Policy issued by [Appellant] as attached**
Warranties	- Premium Warranty (60 days) Endorsement - Date Recognition Clause (Y2K Exclusion)
Exclusions	As per standard Extended Warranty Insurance Policy issued by [Appellant] as attached
Conditions	The above acceptance is subject to an Annual Rate Review on the Premium Structure and Automatic Renewal Clause

Excess/Deductible	Nil
Rate	As per price list as attached
Reinsurance Broker	Aon Insurance Brokers (M) Sdn. Bhd. (Company No. 7544-A) [**Insurance Brokers**]
Total deduction	Ceding commission + RI brokerage 30% OGR + 5% ONR
Levy/Tax	0.25% IGSF (as per directive by Bank Negara Malaysia from time to time)
	1.25% Overseas tax on premium ceded overseas or as applicable as advised by Inland Revenue Department, Malaysia. Not applicable to Malaysian registered reinsurers and reinsurers licensed in Labuan under Offshore Insurance Act 1990.
Cedant retention	15% of Original Benefits and Limits
Reinsurer(s) order	85% of Original Benefits and Limits
	(emphasis added).

Suit In Sessions Court

[6] The appellant filed a suit against the respondent in the Kuala Lumpur Sessions Court (appellant's suit) and alleged the following:

(a) by way of the three Reinsurance Contracts, the appellant had ceded 85% of the original benefits and limits of the Insurance Policies to the respondent;

(b) the respondent had received in full the payment of the respondent's proportionate share of premiums due under the three Reinsurance Contracts;

(c) the appellant had paid Sony in respect of Sony's claims under the Insurance Policies for the insurance periods in 2009, 2010 and 2011 (Settlement of Sony's Claims);

(d) the appellant had sent numerous "settlement loss advices" and/or statements regarding the Settlement of Sony's Claims to the respondent and/or the Insurance Brokers but the respondent "failed and/or refused and/or neglected" to fulfil the respondent's obligation under the three Reinsurance Contracts to indemnify the appellant 85% of the total amount of the Settlement of Sony's Claims (Sum Allegedly Due From Respondent To Appellant);

(e) in or around April 2013, with the respondent's agreement, the appellant set off RM376,455.02 as part of the respondent's proportionate share of premiums under the three Reinsurance Contracts against the Sum Allegedly Due From Respondent To Appellant (Alleged Set-Off); and

(f) despite the Alleged Set-Off, as at 16 May 2014, the respondent still owed RM830,390.80 to the appellant under the three Reinsurance Contracts (Alleged Outstanding Sum).

[7] In the appellant's suit, the appellant prayed for, among others, the following relief:

(a) payment of the Alleged Outstanding Sum by the respondent to the appellant;

(b) a declaration that the respondent is continuously liable towards its proportionate share of all claims or losses paid by the appellant pursuant to the first Reinsurance Contract until 31 October 2014 (Outstanding Sum under first Reinsurance Contract);

(c) a declaration that the respondent is continuously liable to make payment of the Outstanding Sum under first Reinsurance Contract as and when the same crystallises but in any event, within 30 days from the date of the appellant's written notice to the respondent informing of the Outstanding Sum under first Reinsurance Contract;

(d) a declaration that the respondent is continuously liable towards its proportionate share of all claims or losses paid by the appellant pursuant to the second Reinsurance Contract until 31 October 2016 (Outstanding Sum under second Reinsurance Contract);

(e) a declaration that the respondent is continuously liable to make payment of the Outstanding Sum under second Reinsurance Contract as and when the same crystallises but in any event, within 30 days from the date of the appellant's written notice to the respondent informing of the Outstanding Sum under second Reinsurance Contract;

(f) a declaration that the respondent is continuously liable towards its proportionate share of all claims or losses paid by the appellant pursuant to the third Reinsurance Contract until 31 October 2017 (Outstanding Sum under third Reinsurance Contract); and

(g) a declaration that the respondent is continuously liable to make payment of the Outstanding Sum under third Reinsurance Contract as and when the same crystallises but in any event, within 30 days from the date of the appellant's written notice to the respondent informing of the Outstanding Sum under third Reinsurance Contract.

Respondent's Application Under S. 10(1) Of Arbitration Act 2005 (AA)

[8] The respondent applied to the Sessions Court to stay the appellant's suit under s. 10(1) AA (respondent's application) on the ground that the three Reinsurance Contracts read with the Insurance Policies contained the Arbitration Clause.

[9] On 14 November 2014, the Sessions Court allowed the respondent's application and made the following order (Sessions Court's Order):

(a) a stay of all further proceedings in the appellant's suit;

(b) no order as to costs;

(c) the respondent should commence arbitration proceedings within three months from the date of the Sessions Court's Order; and

(d) the appellant is given liberty to apply if there is non-compliance with the Sessions Court's Order.

[10] In this appeal, the appellant seeks to reverse the Sessions Court's Order.

Grounds For Sessions Court's Order

[11] The learned Sessions Court Judge gave the following reasons for the Sessions Court's Order:

> I find that the [Respondent's Application] should be allowed based on the following reasons:
>
> 1. The Respondent did not take step to submit to proceeding instituted by [Appellant] in this action.
> 2. I find that the clauses in the [3 Reinsurance Contracts] clearly shows [*sic*] that this Court does not have jurisdiction over the present dispute.
> 3. ... The terms of the Original Policy/Extended Warranty Insurance Policy ("Original Policy") ... are incorporated into the [3 Reinsurance Contracts].
> 4. This is evident in all the [3 Reinsurance Contracts] which contain the following wordings:
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>> Extension/clauses: As per standard Extended Warranty Insurance Policy issued by [Appellant] as attached.
>
> 5. The [Arbitration Clause] incorporated into the [3 Reinsurance Contracts] is found in the Original Policy ...
> 6. Accordingly, I find that there [sic] the Arbitration Clause is binding in all the [3 Reinsurance Contracts] and the Respondent is privy to the original arbitration agreement.

Sole Issue

[12] Sections 2(1), 9 and 10 AA are relevant to this appeal and are reproduced below:

> Section 2(1). In this Act, unless the context otherwise requires -
>
> **"arbitration agreement" means an arbitration agreement as defined in section 9**

Section 9. Definition and form of arbitration agreement

(1) *In this Act, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not*.

(2) **An arbitration agreement may be in the form of an arbitration clause in an agreement or in the form of a separate agreement**.

(3) An arbitration agreement shall be in writing.

(4) **An arbitration agreement is in writing where it is contained in -**

(a) **a document signed by the parties**;

(b) **an exchange of letters, telex, facsimile or other means of communication which provide a record of the agreement**; or

(c) **an exchange of statement of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other**.

(5) *A reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement, provided that the agreement is in writing and the reference is such as to make that clause part of the agreement*.

Section 10. Arbitration agreement and substantive claim before court

(1) *A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed*.

(emphasis added).

[13] The sole question that arises in this appeal is whether the Arbitration Clause in the Insurance Policies has been incorporated into the three Reinsurance Contracts within the meaning of s. 9(5) AA.

Effect Of Previous Cases

[14] In *Bauer (Malaysia) Sdn Bhd v. Daewoo Corporation* [1999] 4 CLJ 665, at 676 and 678-679, Gopal Sri Ram JCA (as His Lordship then was) decided as follows in the Court of Appeal:

> The next question is whether there are any facts and circumstances in the present case that warrants a finding that the parties either expressly or through their conduct agreed to extend the arbitration clause to the eight work orders. The appellant's case is that the facts and circumstances surrounding the case, in particular, the contemporaneous documentary evidence, reasonably support the conclusion that the parties intended to incorporate the arbitration clause into the eight work orders. The respondent disputes this argument with vigour.

A We were once again regaled with authorities where a term either was, or was not, held to have been incorporated into a contract by reference thereto in another document. Again, I must say that the cases cited by counsel amount to no more than illustrating the application of a well-established principle to particular fact patterns. ...

B Similarly, in *The Abu Road Electricity & Industries Co Ltd v. Industrial Gases Ltd* AIR [1977] Cal. 482, at p. 488, Datta J, after a review of the authorities which included the decision in "*The Annefield*" (*ibid*), said:

On a review of the above cases the following principles regarding the incorporation of the provisions of one agreement into another agreement appear to have been laid down.

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(a) a clause in an earlier contract can be imported into a subsequent contract if the language is appropriate unambiguous and clear.

(b) such clause in the earlier contract can be written in bodily into the later contract if there is no inconsistency or vagueness or uncertainty.

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(c) a clause in the earlier contract which is germane to the subject-matter of the later contract may be incorporated therein by general words though some degree of manipulation may be involved.

(d) in respect of a clause in the earlier agreement which is not directly germane to the subject-matter of the later agreement, it is not permissible to construe general words as incorporating such clause therein when the clause in terms does not relate to transactions of such later contract. Such clause can only be incorporated in the later contract by clear words either in the earlier or subsequent contract.

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F For my part, I would, with respect, enter a caveat in respect of what was said in *The Annefield* (*supra*) and *The Abu Road Electricity & Industries Co Ltd v. Industrial Gases Ltd* (*ibid*). *The four principles set out by the learned judges in these two cases are not to be treated as immutable rules carved upon a tablet of stone. They are but guidelines that assist a court when making a determination whether a term ought to be regarded as having been incorporated into a contract by reference to another document*.

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In my judgment, at the end of the day, whether an incorporation by reference was intended by the parties in a particular case is a question that must be resolved according to the peculiar facts of the individual case. The authorities appear to me to form a spectrum. At one end of that spectrum are cases where no difficulty has been experienced in holding that a term has been incorporated by reference to another document either because of the use of clear and unequivocal language or equally clear implication. Temperley Steam Shipping Co v. Smyth & Co [1905] 2 KB 791 was such a case.

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An example of a case at the other end of the spectrum is *Aughton Ltd v. M F Kent Services Ltd* [1991] 57 BLR 1. ... The plaintiff brought an action against the defendant to recover monies allegedly due to them under each sub-contract. The defendant applied to have the action stayed in

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reliance of the arbitration clause in the sub-contract it had with Press Construction Ltd. The judge at first instance refused a stay on the ground that the general incorporation of the arbitration clause was insufficient. The plaintiff appealed. The English Court of Appeal (Ralph Gibson LJ and Sir John Megaw) dismissed the appeal. Ralph Gibson LJ, accepted that the arbitration clause had become incorporated into the sub-sub-contracts but ruled against its enforceability. Sir John Megaw, on the other hand held that the words used in the defendant's letter of offer were not sufficiently distinct and specific to incorporate the arbitration clause.

(emphasis added).

[15] It is to be noted that the governing law at the time of *Bauer (M) Sdn Bhd* is the Arbitration Act 1952 which has no provision equivalent to s. 9 AA. *Bauer (M) Sdn Bhd* explains that previous cases on whether an arbitration clause in one contract has been incorporated into another contract, provide only "guidelines" and do not constitute binding precedents.

Interpretation Of S. 9 AA

[16] For s. 10(1) AA to apply, there must be an "arbitration agreement". According to s. 2(1) AA, an "arbitration agreement" means an arbitration agreement as defined in s. 9 AA. As such, I now turn to s. 9 AA which is determinative of this appeal. If there is an "arbitration agreement" as understood in s. 9 AA, the Sessions Court is mandatorily required under s. 10(1) AA to stay the appellant's suit unless the "arbitration agreement" is null and void or impossible of performance – the Court of Appeal's judgment in *TNB Fuel Services Sdn Bhd v. China National Coal Group Corp* [2013] 1 LNS 288; [2013] 4 MLJ 857, at p. 870.

[17] In *Albilt Resources Sdn Bhd v. Casaria Construction Sdn Bhd* [2010] 7 CLJ 785; [2010] 3 MLJ 656, at p. 663, cl. 9 of the construction contract between the appellant company and the respondent company expressly stated that the construction contract "shall be based on the Agreement and Conditions of Building Contract (Without Quantities) published by "Pertubuhan Arkitek Malaysia" (PAM Contract). The Court of Appeal unanimously held, among others, at pp. 663-666, 669 and 673, that on a true interpretation of the construction contract in question, the construction contract had incorporated the arbitration provision in the PAM Contract. *Albilt Resources Sdn Bhd* does not concern incorporation into a reinsurance contract of an arbitration clause contained in a primary insurance. More importantly, it is the practice in the construction industry for parties to incorporate "standard" form contracts such as the PAM Contract (which includes an arbitration clause).

[18] I am of the view that there is an "arbitration agreement" within the meaning of s. 9 AA in the following circumstances:

(a) there is in existence a written "agreement by parties to submit to arbitration all or certain disputes which have arisen" between the parties - sub-ss. (1), (2) ("arbitration clause") and (3) of s. 9 AA;

A (b) if a dispute arises in respect of contract "A", the parties to contract "A" have agreed by way of a separate written agreement to arbitrate the dispute arising from contract "A" – s. 9(1), (2) ("separate agreement") and (3) AA;

B (c) a written "arbitration agreement" in certain circumstances specified in s. 9(4)(a) to (c) AA; and

(d) sub-section 9(5) AA applies in the following manner:

(i) if a dispute arises in respect of a written contract "A";

C (ii) contract "A" "refers" to an arbitration clause in a document (which may not be signed by all parties to contract "A") (Separate Arbitration Clause); and

(iii) "the reference is such as to make [the Separate Arbitration Clause] part of" contract "A".

D I am of the view that a mere general reference in contract "A" to a document containing the Separate Arbitration Clause, does not fulfil s. 9(5) AA (to make [the Separate Arbitration Clause] part of" contract "A") so as to incorporate the Separate Arbitration Clause into contract "A". The reference in contract "A" should expressly incorporate the E Separate Arbitration Clause as part of contract "A". This is a question of construction of contract "A" (not the interpretation of the document containing the Separate Arbitration Clause) to ascertain the true, manifest and/or presumed intention of the parties to contract "A".

The above interpretation is supported by the following considerations:

F (1) parties to contract "A" should be given complete liberty to incorporate the Separate Arbitration Clause into contract "A" as the parties see fit. This is especially so in a commercial setting in a free market wherein parties have arguably equal bargaining power and have both the expertise and resources to make informed decisions G on whether to incorporate the Separate Arbitration Clause into contract "A" or otherwise;

(2) I do not think s. 9(5) AA is a provision wherein Parliament has made an inroad into the parties' freedom to incorporate a term into a contract. The wording of s. 9(5) AA, to me, still preserves the H parties' freedom to incorporate the Separate Arbitration Clause or otherwise. If the legislature has intended to curtail the parties' freedom to incorporate the Separate Arbitration Clause, the legislature would have expressly provided as such and s. 9(5) AA would have been worded differently; and I

(3) the above interpretation is consistent with the approach taken by English courts (Approach by English Courts) in interpreting s. 6(b) of the Arbitration Act 1996 (1996 Act) which is similar but is not

identical to our s. 9(5) AA. I will discuss later in this judgment regarding the Approach by English Courts. The Approach by English Courts, as I understand it, is as follows:

(3A) in the absence of special circumstances, a general reference in a reinsurance contract to a document containing an arbitration clause, is not sufficient to incorporate that clause into the reinsurance contract; and

(3B) the parties to a reinsurance contract must expressly refer in the reinsurance contract to an arbitration clause in the insurance policy so as to incorporate that clause into the reinsurance contract.

In *United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd* [1993] 2 CLJ 31; [1993] 1 MLJ 182, at p. 193, the Supreme Court held as follows:

> In our judgment, it is important generally speaking, and more so in matters of commercial law, that there should be uniformity in the common law of the Commonwealth.

It is therefore important for our commercial law, in this case the law of re-insurance, to be consistent with the corresponding law in other Common Law countries, especially English law. I specifically mention English law of insurance in view of the global importance of the English insurance syndicate, "Lloyds of London".

No Incorporation Of Arbitration Clause In Three Reinsurance Contracts

[19] I am of the considered view that an objective reading of the three Reinsurance Contracts shows the manifest intention of both the appellant and respondent not to incorporate the Arbitration Clause into the three Reinsurance Contracts.

[20] The first reason for the above decision is based on the format, arrangement and placement of the provisions in the three Reinsurance Contracts (format). The format concisely provides for two columns – the first column states the subject matter (first column) and the second column provides the terms and conditions of the three Reinsurance Contracts pertaining to the subject matter in question (second column). It is clear that the first and second columns make no mention of any arbitration clause. Accordingly, the format clearly evinces the parties' manifest intention not to incorporate the Arbitration Clause into the three Reinsurance Contracts. If the appellant and the respondent have intended to incorporate the Arbitration Clause into the three Reinsurance Contracts, this would have been expressly provided as such by the parties in the first and second columns. It is highly unlikely that an important matter such as arbitration has been overlooked by

A both the appellant and respondent who have the necessary resources, expertise and legal counsel to make an informed decision on whether to arbitrate possible future disputes or not.

[21] The first and second columns have expressly enumerated in detail the subject matter as well as the terms and conditions of the three Reinsurance
B Contracts. This attracts the application of the maxim of construction, *expressio unius est exclusio alterius*, namely the express mention of one matter, implies the exclusion of matters which have not been mentioned. An application of this maxim is demonstrated in the Federal Court's decision in *Jamaluddin Mohd Radzi & Ors v. Sivakumar Varatharaju Naidu; Suruhanjaya*
C *Pilihan Raya (Intervener)* [2009] 4 CLJ 347; [2009] 4 MLJ 593, at pp. 605-606. Applying the maxim of *expressio unius est exclusio alterius*, when both the appellant and respondent have expressly omitted an arbitration clause in the first and second columns, this can only mean that both parties have manifestly intended not to arbitrate any dispute which may arise from the
D three Reinsurance Contracts. This constitutes the second reason for my above decision.

[22] Even if I am wrong in respect of the above two reasons, I do not find anything in the three Reinsurance Contracts, either expressly or even by way of necessary implication, to show that both the appellant and respondent
E have manifestly intended to incorporate the Arbitration Clause into the three Reinsurance Contracts within the meaning of s. 9(5) AA.

[23] The learned Sessions Court Judge relied on the clause "Extension/ clauses: As per standard Extended Warranty Insurance Policy issued by [Appellant] as attached" (Extension Clause) to support the incorporation of
F the Arbitration Clause into the three Reinsurance Contracts. With respect, I disagree for the following reasons:

(a) the Extension Clause does not concern arbitration. Hence, the Extension Clause cannot be used to incorporate the Arbitration Clause into the
G three Reinsurance Contracts;

(b) if the Extension Clause is construed so widely as the learned Sessions Court Judge has done in this case, this may cause an injustice, if not an absurdity, whereby the Extension Clause may be erroneously used to incorporate terms and conditions of the Insurance Policies which
H materially contradict the terms and conditions of the three Reinsurance Contracts which have been previously negotiated and expressly agreed by both appellant and respondent; and

(c) the Approach by English Courts does not favour the invocation of the Extension Clause so as to justify an incorporation of the Arbitration
I Clause into the three Reinsurance Contracts.

Approach By English Courts

[24] Section 6(b) of the 1996 Act provides as follows:

> *The reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement.*
>
> (emphasis added).

[25] Section 6(b) of the 1996 Act is not identical to our s. 9(5) AA but both provisions contain the phrase "the reference is such as to make that clause part of the agreement". In view of this similarity, I am of the opinion that English cases on the interpretation of s. 6(b) of the 1996 Act are relevant to the statutory construction of our s. 9(5) AA. More importantly, as explained above, in the interest of uniformity of law of re-insurance in Malaysia and England, I am reluctant to adopt a construction of the three Reinsurance Contracts which is different from the Approach by English Courts.

[26] The appellant's learned counsel, YM Tunku Farik bin Tunku Ismail, has submitted that the following English cases (in chronological order), clearly show that the parties in this case have not expressly referred to the Arbitration Clause in the three Reinsurance Contracts so as to incorporate the Arbitration Clause into the three Reinsurance Contracts:

(a) in *Pine Top Insurance Co Ltd v. Unione Italiana Anglo Saxon Reinsurance Co Ltd* [1987] 1 Lloyd's Rep 476, at pp. 477-478:

(i) the defendant company was the reinsurer in this case. The reinsurance contract provided that "All terms, clauses and conditions as original" (All Terms Clause). The reinsurance contract contained an arbitration clause;

(ii) the defendant company retroceded its risk under the reinsurance contract to the plaintiff company. The retrocession contract contained the same All Terms Clause but a different arbitration clause; and

(iii) the question that arose was whether the arbitration clause in reinsurance contract had been incorporated into the retrocession contract.

Despite the wide All Terms Clause in the reinsurance agreement, Gatehouse J in the High Court, at pp. 480 and 481, refused to incorporate into the retrocession contract the arbitration clause as provided in the reinsurance contract. Gatehouse J decided as follows:

> Looking for a moment at the first line in the reinsurance slip, and accepting that "as original" must there mean "as [the insurance policy], it seems to follow necessarily:

A

1) **"All" does not mean "all"**.

2) **The only "terms" that could be incorporated into the reinsurance policy are those which define the risk, namely – the period; the geographical limits, and section 3 – the nature of risk** ...

B

In so far as it is not merely repetitive, the first line in the [All Terms Clause] therefore seems to be contrary to the parties' intention. The only sensible intention I can attribute to the parties is that they were concerned to make sure that the risk undertaken by reinsurers was identical, as to period, geographical limits and nature of the risk, with the risk undertaken by the primary insurers. They therefore used this catch-all phrase, even though it was repetitive, and therefore strictly unnecessary. ...

C

Again, I think the parties to this retrocession agreement were anxious to make sure that identical risks were covered and, similarly, used the convenient catch-all phrase without considering whether it was repetitive and, therefore, strictly unnecessary. ...

D

If this is right, there is no question of [the arbitration clause in the reinsurance contract] being incorporated. ...

So far as the arbitration clause [in the reinsurance contract] is concerned, there is no express reference to it in the [retrocession contract], and, if it is to be incorporated by reason of line 1 of the general conditions, it will not bind the retrocessionaires to arbitrate disputes with the reinsurers. Its wording is quite inappropriate to do so. It would have to be rewritten. ...

E

In any case, I would apply the settled principles of the bills of lading cases and hold that, in the absence of express incorporation in the [retrocession contract], the arbitration clause in the reinsurance contract is not incorporated into the retrocession contract.

F

(emphasis added);

(b) the material facts of *Excess Insurance Co Ltd & Anor v. Mander* [1997] 2 Lloyd's Rep 119, at pp. 120-121, are as follows:

G

(i) the plaintiff companies were reinsurers which had retroceded their liability under the reinsurance contracts to a syndicate of retrocessionaires represented by the defendant. The reinsurance contracts contained an arbitration clause but the retrocession contract did not have such a clause;

H

(ii) the retrocession contract contained an All Terms Clause stating that "All terms, clauses, conditions and warranties as original and to follow original settlements and/or agreements of the Reassured in all respects";

I

(iii) the plaintiff companies sued the defendant in respect of the retrocession contract; and

(iv) the defendant applied to stay the plaintiff companies' suit on the ground that the All Terms Clause incorporated into the retrocession contract the arbitration clause in the reinsurance contracts.

Colman J (as His Lordship then was) in the High Court dismissed the stay application and held, at p. 124 and pp. 127-128, as follows:

> *The imputed mutual intention of the parties has to be arrived at by general principles of construction applicable to any other contractual term. That said, it is certainly true that where, as in the bill of lading cases, a particular approach to construction has been repeatedly and consistently adopted by the Courts in relation to particular types of contract, it can justifiably be said that in the context of such contracts there is a settled rule of construction which must be adhered to in the interests of consistency and certainty in commercial law. …*
>
> *The parties to the retrocession used general words of incorporation and made no specific reference to the arbitration clause. Whereas those general words clearly expressed a mutual intention to incorporate so much of the subject-matter of the [reinsurance contract] as was compatible within the subject-matter of the retrocession, they did not, in my judgment, express any intention to incorporate such arbitration clause as might ultimately be agreed by the leading underwriter under the [reinsurance contract].*
>
> (emphasis added);

(c) *Excess Insurance Co Ltd* has been followed by Raymond Jack QC (as his Lordship then was) in the High Court case of *Trygg Hansa Insurance Co Ltd v. Equitas Ltd & Ors* [1998] 2 Lloyd's Rep 439, at p. 447. In *Trygg Hansa Insurance Co Ltd*, the insurance policy contained an arbitration clause but the reinsurance contract had no arbitration clause. The reinsurance contract provided in cl. 8 that "Except as otherwise provided herein this policy is to follow the same terms, exclusions, conditions, definitions and settlements as the Policy of the Primary Insurers" (cl. 8). The insurers sued the reinsurers in respect of the reinsurance contract and the reinsurers applied to stay this suit under s. 6(2) of the 1996 Act by relying on cl. 8 to incorporate the arbitration clause. The High Court dismissed the reinsurers' stay application on the following grounds, at pp. 446 and 447:

> *Section 6 does not state how it is to be decided whether "the reference is such as to make that clause part of the agreement". As there is an existing body of authority relating to the question what is required to incorporate an arbitration clause from another document, unless there is contrary indication, it would seem that those authorities should be applied.*
>
> The section is clear that an arbitration clause may be incorporated by reference to the document in which it is contained without reference to the specific clause. …
>
> *I have concluded that the right course in these circumstances is for me to apply the law as stated in Excess v. Mander. That provides for consistency*

A *and certainty. So I hold that, in the absence of special circumstances, general words of incorporation are not to be treated as effective for the purposes of s. 6(2) of the 1996 Act. ...*

In accordance with the law as I have concluded I should apply it, these words [in Clause 8] are not to be taken as indicating an intention to incorporate
B *the arbitration clause from the general conditions to the primary insurance. That is conclusive of the applications for a stay.*

(emphasis added);

(d) *Trygg Hansa Insurance Co Ltd* has been affirmed by Morison J in *Cigna Life Insurance Co of Europe SA-NV & Ors v. Intercaser SA De Seguros Y*
C *Reaseguros* [2001] Lloyd's Rep 821, at p. 824, as follows:

Whether general words of incorporation in one contract of terms and conditions in another contract are apt to incorporate an arbitration clause has been a question much debated in the courts. For the reasons he gives, I adopt entirely the principles and conclusion arrived at by Judge Raymond Jack QC
D *(as he then was) in Trygg Hansa v. Equitas ...*

... absent words which expressly incorporated the arbitration clause, words of general incorporation ... are not sufficient. The legal justification for this conclusion comes from the special position which these clauses have in English law. An agreement to arbitrate disputes is regarded as personal to the parties
E *to the agreement and collateral to the main obligations ...*

(emphasis added)

In addition to the need of certainty and consistency in support of the Approach of English Courts as stated in *Trygg Hansa Insurance Co Ltd*, *Cigna Life Insurance Co* provides a third reason, namely an arbitration
F agreement is an agreement in its own right and is personal to the parties in question. Accordingly, parties should expressly incorporate an arbitration clause; and

(e) in *American International Specialty Lines Insurance Co v. Abbott*
G *Laboratories* [2004] Lloyd's Rep 815, at p. 825, Cresswell J followed *Excess Insurance Co Ltd* and *Trygg Hansa Insurance Co Ltd*.

Respondent's Submission

[27] The respondent's learned counsel, Ms. Loo Peh Fern, has cited many cases to resist this appeal (respondent's cases). Regrettably, I am unable to
H accede to her forceful contention because the respondent's cases do not concern the:

(a) interpretation of s. 9(5) AA; and

(b) incorporation of an arbitration clause in a primary insurance into a
I reinsurance contract by a mere general reference in the reinsurance contract to the primary insurance.

Sessions Court's Order Should Be Reversed

[28] I am aware that I am sitting as an appellate judge in respect of the Sessions Court's Order under O. 55 r. 5(1) of the Rules of Court 2012 (RC). Having said that, this appeal only concerns the statutory construction of s. 9(5) AA and an interpretation of the three Reinsurance Contracts. In respect of questions of statutory interpretation and construction of contracts, an appellate court is in the same position as the court of first instance. In interpreting the law and written contracts, a court of first instance does not enjoy any audio-visual advantage *vis-à-vis* an appellate court. Accordingly, an appellate court can and should intervene if it can be shown that the lower court has erred in construing a statutory provision or a contract and such an error in interpretation has caused an injustice to the appellant.

[29] With respect to the learned Sessions Court Judge, I find that she has committed the following errors of law and construction of the three Reinsurance Contracts:

(a) the learned Sessions Court Judge did not consider the scope and application of s. 9(5) AA in this case. Such a lack of direction on her part amounts to an error of law;

(b) the learned Sessions Court Judge did not consider the Approach by English Courts which is relevant in this case because of the similarity in the wording of s. 6(b) of the 1996 Act with our s. 9(5) AA;

(c) for reasons expressed earlier in this judgment, the learned Sessions Court Judge has erred in law by relying on the Extension Clause to justify the incorporation of the Arbitration Clause into the three Reinsurance Contracts; and

(d) the learned Sessions Court Judge has erred by deciding that the terms and conditions of the three Reinsurance Contracts "clearly shows [*sic*] that this court does not have jurisdiction over the present dispute". Firstly, the three Reinsurance Contracts do not have an exclusive foreign jurisdiction clause which will deprive Malaysian courts of the jurisdiction to hear the appellant's suit. As such, the Sessions Court still has jurisdiction to hear the appellant's suit by virtue of s. 65(1)(b) of the Subordinate Courts Act 1948. Even if the respondent is able to establish the incorporation of the Arbitration Clause into the three Reinsurance Contracts, s. 10(1) AA does not oust the jurisdiction of the Sessions Court but only mandates the Sessions Court to stay the appellant's suit and refer the parties to arbitration.

[30] In the following cases, the appellate courts have reversed the lower court's decisions in respect of interpretation of contracts:

A (a) the Court of Appeal in *Albilt Resources Sdn Bhd*, at pp. 663 and 665, reversed the High Court's decision not to stay a suit under s. 10(1) AA. In *Albilt Resources Sdn Bhd*, the Court of Appeal held that the construction contract had incorporated PAM Contract which provided for an arbitration clause; and

B (b) *Home Assurance Co of New York v. Victoria Montreal Fire Insurance Co* [1907] AC 59 is a Privy Council's decision on an appeal from Canada. In this case, at p. 61, Lord MacNaghten delivered the Privy Council's opinion which reversed the decision of the Canadian Supreme Court and restored the judgment of the trial court in respect of the issue of whether
C a limitation clause in an insurance policy had been incorporated into the reinsurance agreement in question.

(emphasis added).

Outcome Of This Appeal

D **[31]** Premised on the above reasons, I am constrained to allow this appeal with costs. I also order the Sessions Court to fix a case management date for this case pursuant to O. 34 r. 1(1) RC.

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